No. 95-813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BRAD BENNETT, *et al.*,

Petitioners,

v.

MARVIN PLENERT, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN FOREST & PAPER ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, NORTHWEST FOREST RESOURCE COUNCIL, AND SOUTHERN TIMBER PURCHASERS COUNCIL, IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amici will address the following questions:

1. Does § 11(g) of the Endangered Species Act ("ESA") -- which authorizes citizen suits by "any person" for "any" alleged "violation" of the ESA and provides that the "district courts shall have jurisdiction" over any such suit, 16 U.S.C. § 1540(g) -- provide standing to its Article III jurisdictional limits and thereby eliminate prudential barriers to standing, such as the "zone of interests" test, which applies to actions brought under the Administrative Procedure Act?

2. Is an ESA § 7, 16 U.S.C. § 1536, biological opinion subject to judicial review, at least when a federal agency takes action in conformance with that opinion?

3. Can a biological opinion violate constraints in ESA § 7, so that there are potentially viable grounds for an ESA § 11(g) citizen suit brought by an economically-injured person?

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STATUTORY AND REGULATORY PROVISIONS

The Endangered Species Act ("ESA") is codified at 16 U.S.C. §§ 1531-44. ESA § 11(g) provides for citizen suits and states in pertinent part:

> (1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf -
> (A) to enjoin any person, including the United States and any other governmental instrumentality . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof . . . .

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[1] Consents to the filing of this brief are on file with the Clerk.

> The district courts shall have jurisdiction . . . to enforce any such provision or regulation.

16 U.S.C. § 1540(g). ESA § 11(g) refers to a suit brought by "any person." The ESA defines "person" as "an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, ..." 16 U.S.C. § 1532(13).

INTEREST OF AMICI CURIAE

Amici represent companies that are regulated, directly and indirectly, under ESA §§ 4, 7 and 9. 16 U.S.C. §§ 1533, 1536 and 1538. ESA § 4 requires a public rulemaking process to list a species as an endangered species or threatened species ("listed species") and to designate critical habitat.

ESA § 7 describes the special obligations of federal agencies toward listed species and critical habitat. These obligations extend to both federal agency actions and private actions requiring some type of federal permit or authorization. ESA § 7 obligations include: (1) the substantive limitations that the federal agency can only approve actions that are "not likely to jeopardize the continued existence of" a listed species or to result in the "adverse modification of [designated critical] habitat" for a listed species; and (2) the procedural duty to assess potential impacts on listed species "in consultation with . . . the Secretary,"[2] who prepares a biological opinion on

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[2] The ESA delegates most authority to the "Secretary," which refers to the Secretary of the Interior for most listed species and to the Secretary of Commerce for certain marine species. *See* 16 U.S.C. § 1532(15). The Interior Secretary has delegated his ESA responsibilities to the U.S. Fish and Wildlife Service ("FWS"), while the National Marine Fisheries Service ("NMFS") performs that role for the Commerce (continued...)

whether the action would jeopardize a listed species' existence or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2) and (b). ESA § 9 prohibits certain acts by "any person," such as the "take" of an endangered species. *Id.* § 1538(a)(1).

Amici represent the forest products and petroleum industries. The American Forest & Paper Association is the national trade association representing the forest products industry. The American Petroleum Institute is the national trade association representing the petroleum industry. These national organizations are joined by two regional trade associations representing the forest products industry: the Northwest Forest Resource Council and the Southern Timber Purchasers Council.

Amici are interested in ensuring that their members have standing to assert that federal agencies are violating ESA limitations by engaging in over-regulation. Such over-regulation can establish inappropriate and unlawful standards and constraints that bar their members -- under pain of potent criminal and civil sanctions and injunctions, *see* 16 U.S.C. § 1540(a), (b), (e)(6), and (g) -- from pursuit of their economic livelihood. The decision below (63 F.3d 915, Pet. App. 1-18) denies ESA standing to persons who are

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[2](...continued)
Secretary. 50 C.F.R. §§ 17.11, 402.01(b). This brief will refer to FWS. FWS has ESA authority over the listed fish species of concern in this case and over the majority of listed species. ESA authority is even more broadly shared because, though FWS and NMFS perform an expert's "consultation" role under ESA § 7(a)(2), all federal agencies proposing "agency action[s]" have the ultimate agency responsibility for determining compliance with ESA § 7(a)(2). 16 U.S.C. § 1536(a)(2).

economically injured by alleged violations of the ESA. Accordingly, *Amici* appear here in support of Petitioners.

Regulation of federal and private lands under ESA §§ 4, 7, and 9 has adversely affected the availability of timber and petroleum resources that *Amici*'s members rely on for their economic livelihood. As more species are listed and as federal agencies become more aggressive in their ESA interpretations, the ESA is becoming a pervasive constraint on, and even a bar to, private economic activity. *See generally* Craig Arnold, *Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*, 10 STAN. L. REV. 1 (1991).

Overly strict and unlawful regulation, in excess of ESA §§ 7 and 9 limitations and requirements, is a continuing problem. Apparent overreaching by FWS and others on what constitutes a wildlife "take" under ESA § 9 and its constituent term "harm," as defined in 50 C.F.R. § 17.3, provided the impetus for the *Sweet Home* suit, which came to the Court last Term.[3] There, the Court found that the "harm" regulation is not facially invalid, if "harm" is limited to acts that do actually, proximately, and foreseeably kill or injure members of a listed wildlife species. *Sweet Home*, 115 S.Ct. 2407, 2412 n.9, 2414 and n.9, 2415, 2418 (1995); *see id.* at 2418-21 (concurring opinion of Justice O'Connor).

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[3] *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407 (1995) ("*Sweet Home*"). The broad interpretations of "harm" that prompted the *Sweet Home* suit are discussed in Steven Quarles, John Macleod, and Thomas Lundquist, Sweet Home *and the Narrowing of Wildlife "Take" Under Section 9 of the Endangered Species Act*, ENVTL. L. RPTR. 10003, 10004-05 (Jan. 1996); Albert Gidari, *The Endangered Species Act: Impact Of Section 9 On Private Landowners*, 24 ENVTL. L. 419, 426 (1994).

This beneficial clarification and limitation of "harm" (and "take") would not have occurred had the Ninth Circuit's view of standing been the law of the land. Because the *Sweet Home* plaintiffs' standing was predicated on "economic[]" injury, 115 S.Ct. at 2410, those plaintiffs would have been denied standing under the Ninth Circuit's rule.

SUMMARY OF THE ARGUMENT

ESA § 11(g) eliminates prudential barriers to standing, such as the "zone of interests" test. This is clear from the statutory language. It broadly authorizes citizen suits by "any person" for "any" alleged "violation" of the ESA and provides that the "district courts shall have jurisdiction" over any such suit. 16 U.S.C. § 1540(g)(1). The identical "any person" language in § 810 of the Civil Rights Act of 1968 has been held to "provide[] standing to the fullest extent permitted by Art. III." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-12 (1972). The *Sweet Home* decision and lower court decisions such as *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1039 (8th Cir. 1988), provide further grounds for concluding that no "zone of interests" test applies to suits under ESA §11(g). *See generally* Section I.

Respondents, in their Opposition to the Petition in this case ("Cert. Opp."), suggest they will not seek to defend the "zone of interests" holding of the court below. Rather, they may seek affirmance on alternate grounds which they stylize as a lack of constitutional standing and lack of enforceable ESA § 7 limits on biological opinions. *See* Cert. Opp. at 9-14. To the extent that such issues are reached by the Court, it is essential to affirm that biological opinions are not immune from judicial review in ESA suits brought by economically-affected parties. *See generally* Section II.

A considerable body of lower court case law subjects biological opinions to searching judicial review. This is as it must be. ESA § 7(a)(2) and (b) make biological opinions the centerpiece for ESA compliance. FWS's biological opinions are sometimes mistaken. At least when federal agencies conform their actions to FWS's biological opinion (which occurs with relatively rare exceptions) and those actions affect citizens, there is a justiciable controversy that warrants searching review of the biological opinion. *See* Section II.A.

Respondents also argue on the merits that ESA § 7 places no substantive limits on biological opinions, so "a flawed biological opinion would not place FWS or the Secretary 'in violation of' the ESA," as required for a successful ESA citizen suit. Cert. Opp. at 11-12. However, a biological opinion may overreach and violate ESA § 7 in several ways. Examples of viable ESA citizen suits brought by economically-injured persons include claims that a biological opinion: (1) incorrectly concluded that a federally-assisted action would jeopardize a listed species, in violation of ESA § 7(a)(2) and (b); (2) was not based on the "best scientific and commercial data available," in violation of ESA § 7(a)(2); (3) offered a "reasonable and prudent alternatives" to the action that were not "economically feasible," in violation of ESA § 7(b)(3) and 50 C.F.R. § 402.02; and (4) required "reasonable and prudent measures" for an incidental take statement that were not economically reasonable, in violation of ESA § 7(b)(4) and 50 C.F.R. § 402.02. *See* Section II.B.

ARGUMENT

Judge Reinhardt's opinion below reaches the incongruous result that -- although ESA § 11(g) broadly authorizes citizen suits by "any person" for "any" alleged violation of the ESA and provides that the "district courts shall have jurisdiction"

over any such suit -- ESA § 11(g) nonetheless poses a barrier to standing that is not required by Article III of the Constitution. Notwithstanding the breadth of standing afforded by the ESA's text, the court below found that a stringent "zone of interests test applies." Pet. App. 11. The Ninth Circuit's express "holding [is] that only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA" and have standing. *Id.*

Petitioners are irrigation interests whose water withdrawals from federal Bureau of Reclamation ("BOR") reservoirs are constrained as a result of BOR's adherence to the "reasonable and prudent alternatives" that FWS's ESA § 7 biological opinion found were needed to avoid jeopardy to Lost River and shortnose suckers, two listed species of fish inhabiting the reservoirs. The court below found that Petitioners lacked prudential standing to argue violations of ESA §§ 7 and 4. "[S]uits by plaintiffs who are interested only in avoiding the burdens of that preservation effort" purportedly are outside the ESA's zone of protected interests. Pet. App. 14.

The court below has inappropriately closed the courthouse door to economically-injured plaintiffs who wish to argue that federal agencies have violated ESA §§ 7 and 4. Notably, the Cert. Opp. did not defend the "zone of interests" test employed by the court below. Instead, the Cert. Opp. (at 9-14) suggested that Respondents would seek affirmance largely on other grounds. Whatever positions on other issues Respondents may take in their merits brief, this Court should reverse the holding of the court below that a prudential "zone of interests" barrier to standing applies to ESA § 11(g) citizen suits.

I. THE ESA'S CITIZEN SUIT PROVISION ELIMINATES PRUDENTIAL STANDING BARRIERS

The *Bennett v. Plenert* decision is part of a disturbing trend in Ninth Circuit jurisprudence. That court tends to grant broad rights of standing and intervention to environmental interests, but to deny equal rights to economic interests.[4] By

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[4] For example, the Ninth Circuit has found that environmental groups have standing to bring facial challenges to forest plans in situations in which other courts have found that a justiciable controversy is absent. *Compare Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992), *with Sierra Club v. Robertson*, 28 F.3d 753 (8th Cir. 1994). In the decision below -- and in cases like *Pacific Northwest Generating Co-Op. v. Brown*, 38 F.3d 1058 (9th Cir. 1994), and *Dan Caputo Co. v. Russian River County Sanitation Dist.*, 749 F.2d 571 (9th Cir. 1984) -- the Ninth Circuit found that environmental interests have citizen suit standing under the ESA and Clean Water Act, while economically-affected entities do not. *See generally* Martha Calhoun and Timothy Hammill, *Environmental Standing In the Ninth Circuit: Wading Through The Quagmire*, 15 PUBLIC LAND L. REV. 249 (1994).

With respect to intervention, the Ninth Circuit initially imposed what amounts to a "zone of interests" test that precluded economically-affected entities from intervening to protect their Rule 24 "interests" in suits brought under environmental statutes. *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 309 (9th Cir.), *cert. denied*, 492 U.S. 911 (1989) (denying intervention to timber interests). That court later supposedly eliminated the "zone of interests" barrier to intervention in suits other than those under the National Environmental Policy Act ("NEPA"). *Sierra Club v. EPA*, 995 F.2d 1478, 1483-85 (9th Cir. 1993). However, the Ninth Circuit has still denied intervention to entities whose contract rights were impaired by an injunction on the unpersuasive ground that the impairment would be short-lived under the injunction. *E.g., Silver v. Babbitt*, 68 F.3d 481, 1995 WL 597667 (9th Cir. 1995). Through an unwarranted parsing of a single civil action into a merits phase and relief phase, the Ninth Circuit has prevented an economically-affected entity from intervening in the merits phase of a NEPA case, and has restricted intervention to briefing the propriety of injunctive relief (which is (continued...)

denying economic interests the right to be heard, the decision below fails an elemental test for fairness: a level playing field.

The inevitable result of such a one-sided standing doctrine is that the law will move in the direction of the (here, environmental) plaintiffs granted standing. The nature of the judicial process is such that, when only one side of a continuing public controversy may seek recourse in the courts, the law moves incrementally towards institutionalizing and legitimizing the position of the interest group that has the ability to invoke the courts' jurisdiction. The position of the party barred from the courts is never heard, is never embraced by the courts, and achieves no legitimacy. The skewed law of standing also results in substantive changes in agency behavior, as an agency evaluates its obligations against the backdrop of judicial decisions construing those obligations and with an eye towards those who can sue the agency. The Court should be reluctant to believe that Congress intended to so skew the development of standing law and substantive law when Congress passed the ESA and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06.

There has been a trend "toward recognizing that injuries other than economic harm are sufficient" for standing. *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). This does not mean, however, that now only environmental interests have

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[4](...continued)
virtually a foregone conclusion in the Ninth Circuit once a violation of an environmental statute is found). *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1499 and n.11 (9th Cir. 1995); *see Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) ("absent 'unusual circumstances,'" an injunction is the appropriate remedy for a NEPA violation).

standing, while economic interests do not. The law of standing has not turned that topsy-turvy.

This *expansion* of standing beyond its historical core of economic injury nonetheless retains that core. The "fact of economic injury is what gives a person standing." *Id.* at 737. "Certainly he who is 'likely to be financially' injured, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477, may be a reliable private attorney general to litigate the issues of the public interest." *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970). Accordingly, the economically-injured Petitioners should be able to argue the public interest inherent in ensuring compliance with the ESA.

No "zone of interests" test or other prudential barrier to standing should apply to ESA § 11(g) citizen suits for the following reasons:

1. "[P]alpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review" like ESA § 11(g). *Sierra Club v. Morton*, 405 U.S. at 733-34. Thus, the Court should presume that ESA § 11(g) provides access to the courts for those alleging economic injury.

The Court should also presume that the ESA citizen suit provision broadens standing beyond the "zone of interests" test that applies to suits brought under the APA.[5] Otherwise, ESA

[5] For suits brought under the APA, the plaintiff must be "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. From this language, the Court derived a prudential standing test for APA suits. This is the "zone of interests" test of "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or (continued...)

§ 11(g)'s references to suits against federal agencies are surplusage, as they add nothing to the right of review already provided by the APA. *See Sweet Home*, 115 S.Ct. at 2413 (there is a "reluctance to treat statutory terms as surplusage").

2. The expansive language of ESA § 11(g) precludes the creation of any prudential barriers to standing in ESA citizen suits. This Court derived the prudential "zone of interests" test from the APA requirement that the plaintiff be "aggrieved by agency action within the meaning of a relevant statute." *Data Processing Serv.*, 397 U.S. at 153 (*quoting* 5 U.S.C. § 702). Subsequently, in *Clarke v. Securities Indust. Ass'n*, 479 U.S. 388, 395, 400 n.16 (1987) ("*Clarke*"), the Court emphasized that the "zone of interest" test "is most usefully understood as a gloss on the meaning of § 702."[6]

[5](...continued)
regulated by the statute or constitutional guarantee in question." *Data Processing Serv.*, 397 U.S. at 153.

[6] The court below read *Clarke* differently. It interpreted *Clarke* as providing for the use of the "traditional zone of interests test" in actions "not brought under the Administrative Procedure Act." Pet. App. 6. *Clarke* made precisely the opposite point. The *Clarke* Court stated that the APA "zone of interests" test "is not a test of universal application," though statutory review provisions other than the APA "may" create their own "prudential standing" tests. *Clarke*, 479 U.S. at 400-01 n.16. As developed in the text, the plain meaning and established judicial meaning of the broad "any person" language of ESA § 11(g) leave no room for courts to apply a "zone of interests" analysis. This remains true even if the APA does apply to ESA citizen suits to the extent of specifying the standard of judicial review, as several lower courts have held. *E.g., Sierra Club v. Glickman*, 67 F.3d 90, 96 (5th Cir. 1995); *Village of False Pass v. Clark*, 733 F.2d 605, 609-10 (9th Cir. 1984). The logic of these decisions is that the APA acts as a gap-filler: that because ESA § 11(g) does not provide any standard for (continued...)

Congress may freely eliminate the "zone of interests" test. "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'" *Gladstone*, 441 U.S. at 100. ESA § 11(g) lacks APA-like language suggesting that the plaintiff must be aggrieved within the meaning or purposes of the ESA. Instead, ESA § 11(g) broadly authorizes citizen suits by "any person" for "any" alleged violation of the ESA. 16 U.S.C. § 1540(g)(1). This broad language clearly encompasses a suit brought by Petitioners or any other economically-injured "person" who is alleging that ESA limitations have been violated.

This is confirmed by the definition of "person" and its use in other ESA sections. Since ESA § 3(13) defines "person" to include a "corporation" and other economically-motivated entities, 16 U.S.C. § 1532(13), ESA § 11(g) should be read as including economically-motivated suits. ESA § 9 makes it unlawful for "any person," including an economically-motivated entity, to "take" an endangered species. 16 U.S.C. § 1538(a)(1). Accordingly, the same "any person" language in ESA § 11(g) should also include economic entities.

The ESA further provides that the "district courts shall have jurisdiction" over a suit brought by "any person." 16

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[6](...continued)
judicial review when suing a federal agency, the APA (in 5 U.S.C. § 706(2)(A)) provides the relevant review standard. However, because ESA § 11(g) itself provides a right of review and its "any person" language signifies that Congress removed prudential barriers to standing, there is no persuasive reason to engraft onto the ESA the APA right of review provision (5 U.S.C. § 702) and its "zone of interests" test.

U.S.C. § 1540(g)(1). This signifies that Congress eliminated prudential barriers to jurisdiction.

3. This Court's precedents confirm that ESA § 11(g) permits suits by economically-injured plaintiffs and eliminates prudential barriers to standing.

a. The language in § 810 of the Civil Rights Act of 1968, allowing a suit by "any person," has been found to provide "standing to the fullest extent permitted by Art. III." *Gladstone*, 441 U.S. at 100; *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-12 (1972). The identical "any person" language in the ESA (and in the citizen suit provisions in many other environmental laws) should be construed to provide standing to the fullest extent permitted by Article III. Moreover, the Court has implicitly so construed ESA § 11(g) in two decisions discussed below.

b. The six Justices who commented on ESA § 11(g) in the 1992 constitutional standing decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), apparently assumed that it expanded standing to its Article III limits. Those Justices opinions focused on why Congress could not go *beyond* Article III limits and create standing where there was no imminent injury-in-fact. *Id.* at 555, 571-74, 578, 580.

c. This 1992 understanding of ESA § 11(g) may explain why the ESA standing of economically-injured plaintiffs was not questioned by the government or any of the three reviewing courts in *Sweet Home*.[7] *Sweet Home* was an

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[7] *Sweet Home Chapter of Communities for a Great Oregon v. Lujan*, 806 F. Supp. 279 (D.D.C. 1992), *aff'd*, 1 F.3d 1 (D.C. Cir. 1993), *rev'd on rehearing as to legality of "harm" regulation*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), (continued...)

ESA citizen suit in which plaintiffs contended that FWS had engaged in over-regulation -- specifically that the "harm" regulation at 50 C.F.R. § 17.3 violated limitations found in ESA §§ 5, 7, and 9. *See* page 4, above.

The *Sweet Home* plaintiffs' standing was clearly premised on economic injury. "Their complaint alleged that application of the 'harm' regulation . . . had injured them economically." *Sweet Home*, 115 S.Ct. at 2410. "Plaintiffs claim that those restrictions [on timber harvesting] have forced them to lay off employees, . . . and placed some of the plaintiffs in the position of being unable to support their families." *Sweet Home*, 806 F. Supp. at 282.

Although the Court was "under an independent obligation" to question standing if there was a legitimate standing issue (*FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990)), no such standing issue was raised in *Sweet Home*. (Nor did the government raise a standing issue or "zone of interests" before any of the three courts in *Sweet Home*.) After noting that plaintiffs had been "injured . . . economically" by an ESA regulation, this Court proceeded directly to the merits. *Sweet Home*, 115 S.Ct. at 2410.

Thus, this Court's merits disposition in *Sweet Home* signifies that the court below erred in holding that "economic interests" or other persons desiring to reduce ESA "burdens" are disqualified from ESA standing, and erred in holding that

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[7](...continued)
rev'd finding the "harm" regulation facially valid sub nom. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S.Ct. 2407 (1995). *Amici* include one of the plaintiffs in that case (the Southern Timber Purchasers Council). Counsel for *Amici* served as counsel for plaintiffs in *Sweet Home*.

"only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests" that can bring ESA § 11(g) citizen suits. Pet. App. at 11-12, 14.

d. The Court has construed the citizen suit language in the Federal Water Pollution Control Act (33 U.S.C. § 1365) -- and seemingly the citizen suit language of the Marine Act, 33 U.S.C. § 1415, that was the model for ESA § 11(g) (*see* page 16 n.10, below) -- as allowing suits by all citizens suffering constitutional injury-in-fact. It allowed a suit by "respondents who assert that they have suffered tangible economic injuries because of statutory violations." *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16-17 (1981). Accordingly, the economic injuries suffered by Petitioners here should not preclude their standing under another environmentally-oriented statute.

4. The better-reasoned lower court opinions have concluded, consistent with this Court's opinion in *Gladstone*, that the "any person" language provides standing to the fullest extent permitted by Article III. The Eighth Circuit and at least three other lower courts have concluded that ESA § 11(g) eliminates the prudential "zone of interests" test:

> Unlike the constitutional requirements, Congress may eliminate the prudential limitations [on standing] by legislation. . . . In this case, the ESA provides that "any person" may commence a suit to enjoin any person who is alleged to be in violation of the ESA. . . . Defenders therefore need meet only the constitutional requirements for standing for their claims under the ESA.[8]

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[8] *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1039 (8th Cir. 1988), *opinion after remand*, 911 F.2d 117 (8th Cir. 1990), *rev'd on* (continued...)

Other appellate decisions have correctly read indistinguishable citizen suit provisions as removing prudential barriers to standing.[9]

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[8](...continued)
other grounds, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); *see Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 929 (D. Mont. 1992) (plaintiffs suing under the ESA "need only meet the constitutional requirements for standing"); *Region 8 Forest Service Timber Purchasers Council v. Alcock*, 736 F. Supp. 267, 273 (N.D. Ga. 1990) ("the citizen suit proviso of the Species Act 'clearly removes the judicial authority to create prudential barriers'" to standing), *aff'd due to lack of constitutional standing*, 993 F.2d 800 (11th Cir. 1993), *cert. denied*, 114 S.Ct. 683 (1994); *Fouke Co. v. Brown*, 463 F. Supp. 1142, 1144 (E.D. Cal. 1979).

[9] *E.g., Family and Children's Ctr. v. School City*, 13 F.3d 1052, 1061 (7th Cir.), *cert. denied*, 115 S.Ct. 420 (1994); *Public Interest Research Group v. Powell Duffryn Terminals Inc.*, 913 F.3d 64, 70 n.3 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); *Competitive Ent. Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 118-19 (D.C. Cir. 1990); *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1336-37 (D.C. Cir. 1986); *Alvarez v. Longboy*, 697 F.2d 1333, 1336 (9th Cir. 1983); *Consumers Union v. FTC*, 691 F.2d 575, 576 (D.C. Cir. 1982) (*en banc*), *aff'd*, 463 U.S. 1216 (1983). Given this long line of D.C. Circuit authority, it is surprising the D.C. Circuit assumed that a prudential "zone of interests" test applied under the ESA in three cases cited by the court below. Pet. App. 8 n.3, *citing Idaho v. ICC*, 35 F.3d 585, 592 (D.C. Cir. 1994); *Humane Soc'y v. Hodel*, 840 F.2d 45, 60-61 (D.C. Cir. 1988); *National Audubon Soc'y v. Hester*, 801 F.2d 405, 407 n.2 (D.C. Cir. 1986). Because the applicability of a "zone of interests" test apparently was not opposed by the plaintiffs in those cases and standing was found, those cases' statements about the "zone of interests" test were not necessary to the decisions. Additionally, the most recent opinion cites the ESA § 11(g) "any person" language as meaning that the "ESA specifically authorizes a State to bring an action to enforce its provisions." *Idaho*, 35 F.3d at 592. Thus, the *Idaho* opinion can be read as endorsing broad ESA standing, and D.C. Circuit decisions provide little support for the Ninth Circuit opinion under review.

5. The direct legislative history of ESA § 11(g) does nothing to contradict the broad statutory language. It does *not* suggest an intent to restrict access to the courts.[10]

Moreover, Congress has stated that citizen suit provisions with similar language push standing to its constitutional limits. The Surface Mining Control and Reclamation Act of 1977 contains a provision allowing "any person having an interest which is or may be adversely affected" to commence a citizen suit, and provides that the "district courts shall have jurisdiction." 30 U.S.C. § 1270(a). The House Report stated that this language "shall be construed to be coterminous with the broadest standing requirements enunciated by the U.S. Supreme Court." H.R. REP. NO. 218, 95th Cong., 1st Sess., *reprinted in* 1977 U.S.C.C.A.N. 593, 626. The identical language in ESA § 11(g) should be similarly construed to eliminate prudential barriers to standing.

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[10] The House Report repeats the "any person" language employed in the ESA text and identifies the model for the ESA language:

> It allows any person, including a Federal official, to seek remedies involving injunctive relief for violations or potential violations of the Act. The language is parallel to that contained in the recent Marine Protection, Research and Sanctuaries Act of 1972, and is to be interpreted in the same fashion.

H.R. REP. NO. 412, 93d Cong., 1st Sess. 19 (1973). The model is the citizen suit subsection of the ocean dumping section of the Marine Act, 33 U.S.C. § 1415(g). The legislative history of the referenced Marine Act also states that this "subsection provides for a civil suit by *any person* on his own behalf to enjoin violations of the Act or violations of regulations." S. REP. NO. 451, 92d Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 4234, 4249 (emphasis added). Thus, the legislative history of ESA § 11(g) provides no basis for questioning the obvious breadth of the statutory language.

6. In sum, the Court should hold that no "zone of interests" test or other prudential barrier to standing applies to ESA § 11(g) suits. The contrary holding of the court below should be reversed.[11]

II. RESPONDENTS' ALTERNATIVE ESA ARGUMENTS LACK MERIT

In opposing this Court's grant of *certiorari*, the government did not directly defend the "zone of interests" holding of the court below. Instead, the government sought to invoke a theory of constitutional standing to sustain the judgment (Cert. Opp. at 9-11), and argued on the merits that even a "flawed biological opinion would not place FWS or the Secretary 'in violation of' the ESA." Cert. Opp. at 11-12.

In part because it is unclear what the government will argue now that the Court has granted review, *Amici* will not attempt to address in this brief the intricacies of whether the case as now constituted presents a justiciable controversy over the biological opinion in question. The issues of constitutional

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[11] It can be asked: How did the court below reach such an obviously mistaken result? One answer is that the court below seemed more interested in extending the one-sided theory of standing expressed in other questionable Ninth Circuit decisions than in confronting the ESA statutory language and cases broadly construing the "any person" language. For example, the court below blithely brushed aside the ESA § 11(g) language by stating "our court, and others, have regularly employed the zone of interests test in determining standing despite Congress' enactment of expansive citizen suit provisions." Pet. App. at 8-9. But the legislative judgment *is* controlling as to whether prudential barriers to standing should be applied. *Clarke*, 479 U.S. at 394 n.7; *Gladstone*, 441 U.S. at 100. This Court's precedents in *Gladstone* and *Trafficante* were not even mentioned in the opinion below; *Clarke* was misinterpreted; and contrary circuit court precedents like *Defenders of Wildlife* were relegated to a footnote. *See* Pet. App. at 8 n.3.

standing, final agency action, and proper governmental defendants, to which the government has alluded are beyond the scope of this brief.

Amici are very concerned, however, that the government's effort to demonstrate the nonjusticiability of the instant case is based on arguments that would undermine the ability of parties economically injured by biological opinions to mount effective challenges to erroneous opinions in any suit. Specifically, in Section II.A, *Amici* will show that biological opinions have been, and properly are, subject to judicial review in a wide range of circumstances. In Section II.B, *Amici* will show that ESA § 7 does place constraints on a biological opinion, so a "flawed biological opinion" *can* violate the ESA.

These issues are significant because of the broad range of economic activity that is adversely affected by ESA § 7. 16 U.S.C. § 1536. While ESA § 7 concerns the responsibilities of federal agencies, it also imposes restrictions on private activities that require any form of federal authorization.[12] Under ESA § 7(a)(2), the private activity cannot be conducted: (1) until the federal agency whose authorization is needed ("action agency") completes an ESA consultation process with

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[12] The regulations implementing ESA § 7 broadly define a covered "Action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies." These include: (1) the "granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid" to the private sector; and (2) allowing private economic uses of federal lands that "directly or indirectly caus[e] modifications to the land, water, or air." 50 C.F.R. § 402.02; *see id.* at definition of "effects of the action." Due to the "wide range of projects involving federal permits, approvals, funding, or participation, the potential impact of section 7 [on "private" activities] is quite extensive." Arnold, 10 STAN. ENVTL. L. J. at 1-2; *see* Brief Amicus Curiae of the National Association of Homebuilders in Support of Certiorari at 4-6.

FWS or NMFS, the government's expert agencies on ESA matters; and (2) if the action agency concludes that the action is likely to jeopardize the continued existence of any listed species or adversely modify any designated critical habitat:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical . . . .

16 U.S.C. § 1536(a)(2). FWS carries out its formal "consultation" role by preparing a biological opinion on the effects of the proposed agency action pursuant to ESA § 7(b), 16 U.S.C. § 1536(b). In Section II.B, we will explain some of the ESA § 7(b) constraints on biological opinions.

A. Biological Opinions Are Subject To Judicial Review

1. Because the expert agency's biological opinion was intended by Congress to, and does in practice, normally control the action agency's final action, the highly significant and determinative biological opinion should be subject to judicial review. The ESA's structure suggests Congress did not expect that biological opinions would escape review.[13]

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[13] In other words, one can agree with the Solicitor General's premise that FWS's biological opinion is advisory and leaves the action agency (at least theoretically, if not in practice) with the ultimate agency authority to determine compliance with ESA § 7(a)(2). *See* Cert. Opp. at 10-11. However, this premise does *not* warrant the conclusion that biological opinions forever escape judicial review.

ESA § 7(a)(2) and (b) establish an extensive process for consulting with the ESA-expert agency (FWS or NMFS). The process includes obtaining expert agency's biological opinion on whether the agency action would jeopardize a listed species, obtaining in the opinion the expert's "reasonable and prudent alternatives" if jeopardy is found, and obtaining in the opinion the expert's judgment on the "reasonable and prudent measures" needed to obtain an incidental take statement. 16 U.S.C.§ 1536(a)(2), (b); 50 C.F.R. § 402.14(g)-(j). Congress made the biological opinion the *centerpiece* of this extensive process because it expected that action agencies would adhere to the expert's biological opinion.

Respondents have suggested, however, that the action agency's ultimate decision on ESA compliance for a federally-assisted action is not sufficiently influenced by (or, in "standing" parlance, is "not fairly traceable to") the content of a biological opinion. Cert. Opp. at 10-11. That argument renders meaningless ESA § 7(b), and does not accord with legal and practical realities. Courts have found that an action agency that acts contrary to a biological opinion does so at its considerable peril.[14] Thus, as a practical matter, action agencies *must and do* comply with FWS's biological opinions.

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[14] *E.g., Sierra Club v. Marsh*, 816 F.2d 1376, 1388 (9th Cir. 1987) (FWS "is primarily responsible for protecting endangered species . . . . we defer to the agency [FWS] with the more appropriate expertise"); Michael Bean, THE EVOLUTION OF NATIONAL WILDLIFE LAW 362, 368 (Praeger 1983) (courts have "erect[ed] a major hurdle for an agency that chooses to [proceed with a project] . . . in the face of an adverse biological opinion"); 51 Fed. Reg. 19956 (June 3, 1986) (preamble to final ESA § 7 regulations stating "courts have accorded Service biological opinions great deference").

In fact, BOR complied with FWS's biological opinion here. BOR agreed to follow the "reasonable and prudent alternatives" that FWS's biological opinion said were necessary to avoid jeopardy to the listed fish species (minimum reservoir levels). *See* Pet. App. 3-4, 24-25, 32, 39-40.

In sum, a biological opinion was intended to and does normally dictate the action agency's decision. Accordingly, economic injuries can be fairly traced to the biological opinion, at least when (as here) the action agency follows that opinion.

2. Any argument that a biological opinion might be shielded from a searching judicial review flies in the face of numerous lower court decisions that have reviewed the adequacy of biological opinions. *E.g., Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336-37 (9th Cir. 1992); *Connor v. Burford*, 848 F.2d 1441, 1451-58 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989); *Mausolf v. Babbitt*, 913 F. Supp. 1334 (D. Minn. 1996); *Westlands Water Dist. v. United States Dep't of the Interior*, 850 F. Supp. 1388, 1425-26 (E.D. Cal. 1994); *Idaho Dep't of Fish and Game v. National Marine Fisheries Serv.*, 850 F. Supp. 886 (D. Or. 1994), *dismissed as moot*, 56 F.3d 1071 (9th Cir. 1995); *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 932-36 (D. Mont. 1992). Biological opinions have been reviewed in suits brought by persons trying to reduce ESA burdens, such as the plaintiffs in *Mausolf* and *Westlands*. In two prior suits, constitutional standing to challenge a biological opinion was contested on grounds like those the government may present here, and standing was found to exist. *Mausolf*, 913 F. Supp. at 1341-43; *Swan View Coalition*, 824 F. Supp. at 929-32.

Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy, 898 F.2d 1410 (9th Cir. 1990), cited by the government (Cert. Opp. at 10), is not to the contrary.

Because that plaintiff failed to name FWS as "a party to this action" (898 F.2d at 1415), the court found the plaintiff could not directly question FWS's biological opinion. Here, since Petitioners named FWS as a defendant and challenged its biological opinion, the *Pyramid Lake* logic does not apply.

3. Thus, the legally-significant and normally-determinative biological opinion is and should be subject to a searching judicial review at some stage -- it cannot evade judicial review forever. We take no position on whether the biological opinion at issue here, viewed in isolation at the time of its issuance, is subject to judicial review or whether the Complaint should be characterized as bringing that type of challenge. In at least some factual situations, the existence of an adverse biological opinion does seem to cause a sufficient injury to create a justiciable controversy.[15]

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[15] Just as ESA § 11(g) provides standing to its constitutional limits, *see* Section I, ESA § 11(g) seems to extend the jurisdictional concepts of ripeness and reviewable agency action to their constitutional limits. ESA § 11(g) purports to provide district court "jurisdiction" over "any" claim that any "agency" action, including FWS's issuance of a biological opinion, is "in violation of" the ESA. 16 U.S.C. § 1540(g)(1).

When, for example, the issuance of an adverse biological opinion lowers property values or causes a bank to refuse to lend money for a federally-assisted project, this economic injury may require judicial review of the opinion even in the absence of a decision by the action agency. Another compelling example concerns the Ninth Circuit's logic that, after a new species is listed under the ESA, ongoing timber harvesting and activities in a national forest containing that species must be enjoined until ESA consultation is completed on the forest plan for that national forest. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1793 (1995). If FWS issues an allegedly-mistaken biological opinion, there appears to be a sufficient economic injury (due to the continuing injunction) for present judicial review of the opinion, rather than letting injuries continue until an action is taken based on the allegedly-mistaken opinion.

Although a challenge to a biological opinion at the time of its issuance should be considered ripe to address any injury the opinion inflicts, once the action agency has relied on a biological opinion and has taken a final action that threatens immediate injury to a plaintiff, there certainly is a concrete controversy for review. The constitutional minima for standing also clearly would be satisfied. Plaintiff's alleged injury would be fairly traceable to the biological opinion when the action agency simply structured its action to conform with the opinion. The plaintiff's economic injury would likely be redressed if a court required correction of the biological opinion, because the action agency likely would follow FWS's less-onerous opinion.

Additionally, once a plaintiff is in court, and affected by the biological opinion through final agency action, judicial review necessarily extends to the biological opinion that formed the basis for the agency's ultimate action. *Accord Bangor Hydro Electric Co. v. FERC*, 78 F.3d 659 (D.C. Cir. 1996) (searching review of FWS's fisheries prescriptions on review of FERC order adopting those prescriptions). This proposition reflects ordinary rules of administrative law. The APA provides for full review of a "preliminary, procedural, or intermediate agency action or ruling" during the review of the "final agency action." 5 U.S.C. § 704. Thus, to the extent a biological opinion is viewed as only an "intermediate" ruling, the opinion is subject to full judicial review during review of an action agency's final action.

B. There Are Viable Claims That ESA § 7 Has Been Violated By Over-Regulation

Thus, there is no jurisdictional bar to subjecting a biological opinion to searching judicial review. This leaves Respondents' *merits* argument that "a flawed biological opinion

would not place FWS or the Secretary 'in violation of' the ESA" because ESA § 7 lacks substantive limits enforceable by an economically-injured plaintiff. Cert. Opp. at 11-12.

As shown below, ESA § 7 and the implementing regulations at 50 C.F.R. Part 402 *do* establish legal constraints on biological opinions. If an opinion exceeds such constraints, there has been a "violation of a[] provision of this [ESA] chapter or regulation" that can be enjoined. 16 U.S.C. § 1540(g)(1)(A). Thus, as the examples below demonstrate, ESA § 7 provides numerous grounds for economically-injured persons to bring successful ESA § 11(g) citizen suits.

1. The ESA and regulations establish a maximum time period for ESA consultation and issuance of a biological opinion on any federally-assisted action involving a private "applicant," unless the applicant agrees to a time extension. *See* 16 U.S.C. § 1536(b)(1)(B); 50 C.F.R. § 402.14(e). Thus, there is a viable suit that FWS has violated ESA § 7 when it has taken longer than the maximum period to provide its biological opinion, and thereby unlawfully delayed a needed federal authorization.

2. Closer to the claims in this case, FWS violates its ESA § 7 duty to issue an accurate biological opinion when it concludes that a federally-assisted action would jeopardize the continued existence of a listed species, if the plaintiff can show that the jeopardy conclusion is factually inaccurate or is based on an incorrect legal standard. Petitioners bring a claim that FWS has "improperly conclud[ed]" that continued operation of the reservoirs "is likely to jeopardize" listed species of fish. Pet. App. 40-41. There are several ways that a plaintiff can demonstrate that a jeopardy opinion is mistaken.

a. A biological opinion must be based on the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). Thus, a jeopardy conclusion based on outdated or inaccurate data violates ESA § 7(a)(2). *Accord Endangered Species Comm. of the Building Indus. Ass'n v. Babbitt*, 852 F. Supp. 32 (D.D.C. 1992) (example where FWS failed to disclose the questionable data for an ESA § 4 listing decision).

b. A biological opinion should be restricted to "how the agency action affects the species or its critical habitat" and whether the incremental effects of the "agency action" cause jeopardy or adversely modify critical habitat. 16 U.S.C. § 1536(b)(3). FWS, instead of restricting its opinion to the effects of the "agency action" (defined in § 1536(a)(2) as the specific portion of a private action that requires federal authorization), sometimes finds jeopardy based on the current status of the species under the "environmental baseline," on the indirect effects of interrelated private actions that do not require a federal approval, or on the "cumulative effects" of unrelated actions. *See* 50 C.F.R. §§ 402.02 (definitions of "cumulative effects" and "effects of the action"), 402.14(g)(3) and (4); James Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look from A Litigator's Perspective*, 21 ENVTL. L. 499, 531-34 (1991). When the "agency action" itself would not cause jeopardy itself, there is a credible argument that a jeopardy opinion violates the above-quoted portions of ESA § 7(a)(2) and (b)(3).

c. As another example of legally-mistaken jeopardy opinions, a threatened species usually has a sizable number of members over the listed area (*e.g.*, the grizzly bear, which 50 C.F.R. § 17.11(h) lists as threatened in the conterminous 48 United States). However, FWS sometimes determines jeopardy, not with respect to the entire "threatened species,"

but with respect to a smaller "population" (*e.g.*, grizzly bears in the Selkirk Mountains). This approach finds jeopardy more frequently, since it is easier to jeopardize a small population than an entire species.

There is a convincing argument that such a biological opinion violates ESA § 7(a)(2). FWS will not have determined jeopardy with respect to the "endangered species or threatened species" unit which is listed in 50 C.F.R. § 17.11(h), as 16 U.S.C. § 1536(a)(2) explicitly requires.

3. Two provisions in ESA § 7(b) require that a biological opinion offer economically reasonable solutions to ESA compliance problems. When FWS does not do so, there are viable claims that the opinion violates ESA § 7(b)(3) or (b)(4).

a. If the biological opinion concludes that the proposed action would jeopardize a listed species, the opinion "shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action." 16 U.S.C. § 1536(b)(3)(A). As the statutory language suggests and implementing regulations confirm, the "reasonable and prudent alternatives" must be economically "reasonable" and still allow the private applicant to implement an alternative form of its desired action. FWS's biological opinion must identify alternatives that are "economically and technologically feasible" and that "can be implemented in a manner consistent with the intended purpose of the action." 50 C.F.R. § 402.02 (definition of "reasonable and prudent alternatives"); *see* 51 Fed. Reg. 19937 (June 3, 1986) (explanation in preamble to final rules); Kilbourne, 21 ENVTL. L. at 543.

Thus, there is a viable claim that FWS has violated ESA § 7(b)(3) and the regulations if its biological opinion suggests "reasonable and prudent alternatives" that are not economically reasonable. *See Westlands Water Dist.*, 850 F. Supp. at 1425-26 (example of such a claim by irrigation interests).

b. A biological opinion may also violate an economic limitation in 16 U.S.C. § 1536(b)(4). ESA § 7(b)(4) provides for the issuance of an incidental take statement which excuses the federally-assisted action from any incidental "take" (*see* ESA § 7(o)) otherwise barred by ESA § 9, if the action meets ESA § 7(a)(2)'s minimum standard of avoiding jeopardy to the listed species as a whole. A person who desires the benefit of an incidental take statement must agree to go beyond the minimum required to avoid jeopardy at the species level and adopt "those reasonable and prudent measures that the Secretary" specifies in the biological opinion to minimize "takes" of individuals. 16 U.S.C. § 1536(b)(4)(B)(ii).

"Reasonable and prudent measures" also must be economically reasonable. "[T]hey should be minor changes that do not alter the basic design, location, duration, or timing of the action." 51 Fed. Reg. 19937 (June 3, 1986) (preamble explaining the 50 C.F.R. § 402.02 definition of "reasonable and prudent measures"). *See* Kilbourne, 21 ENVTL. L. at 554-56. Accordingly, there is a viable claim that a biological opinion violates ESA § 7(b)(4) if it adopts "reasonable and prudent measures" that are not economically prudent.[16]

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[16] The ESA, as originally enacted in 1973, may have reflected a goal of reversing the "trend towards species extinction, whatever the cost." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). But the ESA amendments Congress adopted in 1978, 1979, and 1982 in reaction to the *TVA* decision -- such as 16 U.S.C. §§ 1533(b)(2), (continued...)

Additionally, a biological opinion can violate ESA §§ 7(b)(4) and 9 when it identifies as "incidental take" (and imposes "reasonable and prudent measures" to minimize such incidental take) an activity that is not "take" under this Court's decision in *Sweet Home*. *See Mausolf v. Babbitt*, 913 F. Supp. at 1344 (example of such a successful claim).

c. Petitioners assert violations of ESA § 7(b)(3) and (4). FWS's biological opinion found that continuation of past operating regime for the BOR reservoirs is likely to jeopardize listed fish species, even though the fish species obviously survived during the past operating regime. FWS specified minimum lake or reservoir levels as ESA § 7(b)(3) reasonable and prudent alternatives to avoid jeopardy -- and, apparently, as ESA § 7(b)(4) reasonable and prudent measures to minimize "take" -- and BOR agreed to adopt these alternatives and

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[16](...continued)
1536(a)(2), (b)(3), (b)(4), (e)-(h), 1539(a) -- signify that economics do count and some costs are too great to bear.

Moreover, in the unlikely event that a "zone of interests" test applies to ESA citizen suits, ESA § 7(b)(3) and (b)(4) make it clear that economic interests are protected under ESA § 7. Accordingly, Petitioners meet the standard "zone of interests" test of whether "'the interest sought to be protected by the complainant [is] arguably within the zone of interests to be protected or regulated by the statute'" in question. *Clarke*, 479 U.S. at 396 (*quoting Data Processing Serv.*, 397 U.S. at 153). Contrary to Judge Reinhardt's miserly approach to the "zone of interests," the "test is not meant to be especially demanding." *Clarke*, 479 U.S. at 399. The test is not demanding in part because a plaintiff's interests only "arguably" must be within the zone of interests either "regulated" or "protected" by some aspect of the statute the plaintiff seeks to enforce. Petitioners meet both alternative tests. *See Westlands Water Dist.*, 850 F. Supp. at 1425 (if a "zone of interests" test applies, water interests which will be constrained under the authority of ESA § 7 meet that test for ESA § 7 challenges).

measures. *See* Pet. App. 3-4, 24-25, 32, 37-40. Petitioners challenge those minimum lake levels as a violation of ESA § 7 in their second claim for relief. Pet. App. 41. Hence, Petitioners' notice pleading brings potentially-viable ESA § 7(b)(3) and (b)(4) claims.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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